(1)

90-666

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

MARSHA FELDMAN, CAROLE ALLEN, PATRICIA STUBE, JOANNE RYAN, SHARON URBON, JANE KELLEY, and ALBERTA GORDON,

Petiitoners,

v.

UNITED STATES OF AMERICA and CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 16, 1990

QUESTION PRESENTED

Does the time for individuals to intervene begin to run even though the court declares that an existing party will adequately represent those individuals.

In this case, a Title VII brought by the UNITED STATES, was the time to intervene running at a time when the Court declared that the Government would adequately represent the victims of discrimination, or does it begin to run when petitioners first knew of the Government's agreement to settle the claim of one of the petitioners for a fraction of her actual damages, and its agreement to forgo entirely the claims of the other petitioners.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 908 F.2d 197, and is reprinted in the Appendix.

The minute order of the United States District Court for the Northern District of Illinois (Marshall, D.J.) has not been reported. It is reprinted in the Appendix, along with findings orally given.

J U R I S D I C T I O N

This is a petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit, to reveiw the judgment entered on July 24, 1990, which affirmed the district court's order of June 6, 1989 (NR 1861) denying petitioners' petition to intervene for individualized relief.

This Court has jurisdiction under 28 U.S.C 1254(1).

STATUTE INVOLVED

Rule 24. Intervention

(a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States

confers an unconditional right to intervene; or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer of agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights or the original parties.

S T A T E M E N T O F T H E C A S E

In 1973 the plaintiff UNITED STATES brought this suit against the defendant CITY OF CHICAGO (CITY) complaining that it discriminated against females, blacks and Hispanics in hiring and promotion practices in the Chicago police department (NR 1).

The plaintiff invoked the jurisdiction of the District Court under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 24 U.S.C. Sec. 2000e et seq., and under Sec. 1331 and 1345 (general federal question jurisdiction; UNITED STATES as plaintiff).

On November 24, 1974, the District Court denied the motion of plaintiff-intervenor CAROLYN BURAURER,

represented by private counsel, to represent females as a class, after both the UNITED STATES and the CITY objected. The District Court decreed that the Government would represent the females (NR 188, 195, 196, 198, 207, 232, 246).

On February 2, 1976, after a trial, the District Court decreed that the CITY intentionally discriminated against females in hiring and promotion. The CITY severely limited the number of females hired. In 1973, the Chicago Police Department employed 115 females in sworn (officer) positions, out of a total of approximately 13,500 total sworn positions. Before it gave the 1973 sergeants' test, the CITY had barred female officers from taking promotion exams. (United States v. City, 385 F. Supp.543 at 548 (1974);

United States v. City, 411 F. Supp.218 at 229-230 (1976), aff'd 549 F.2d 415 (7th Cir. 1977).

The District Court did not find intentional discrimination against blacks and Hispanics, but determined that the CITY's hiring and promotion tests had disparate impact on these minorities. United States v. City, 411 F. Supp.218 at 234,236.

The District Court ordered the CITY to make whole the victims of discrimination by an award of back pay and retroactive seniority adjustments. The Court indicated the Government should request ancillary proceedings if the parties could not settle the issue of damages. (U.S. v. City, 411 F. Supp.218 at 251 (1976).

In February and April of 1978, the UNITED STATES informed the CITY that, at

that time, to make identified victims whole, actual damages would exceed $25,000,000, and a fair interest rate would be 6% (NR 1729 and 1741, Exhibits A & B).

On December 1, 1978, the Government filed a motion for ancillary proceedings to resolve back pay issues. The CITY filed objections (NR 838,840,891,892). The District Court never decided the motion.

On December 13, 1978, intervenors CAROLYN BURAURER and BARBARA MCNAMARA, represented by private counsel, filed their petitions for individualized relief (NR 842).

Nine years later, and eleven years after the finding of liability, on February 23, 1987, the District Court heard the BURAURER and MCNAMARA petitions. The Court awarded BARBARA

MCNAMARA $104,424.84 in actual damages (mostly interest) (NR 1458-60). The judgment was affirmed, United States v. City, 853 F.2d 572 (7th Cir. 1988).

In April of 1988, the UNITED STATES and CITY presented their proposed consent decree to resolve back pay and seniority issues. In the decree, the parties identified 215 females and 449 minority males as victims on the hiring level, and 3 females and 38 minority males as victims in promotion to sergeant (NR 1589, 1834, 1860).

The District Court ordered the CITY to distribute the consent decree throughout the police department.

On July 22, 1988, after learning of the terms of the proposed consent decree, the present petitioners filed

their petition to intervene for individualized relief (NR 1741,1742, 1778, 1782).

Petitioner MARSHA FELDMAN, who the parties identified as a victim of discrimination on the hiring level, sought to intervene because she would receive only about 12% of her acutal back pay and interest. When FELDMAN, #122 on the 1972 female hiring list, calculates her damages using the formula applied to intervenor BARBARA MCNAMARA, her damages are $123,959.90, rather than $14,517.15 which she whe will receive under the consent decree. Conversely, if MCNAMARA, #129 on the 1972 female hiring list, took her award under the formula of the consent decree, she would

receive only $18,304.39. (NR 1729, 1747; responses of parties: NR 1765-66, 1771).

The remaining petitioners, CAROLE ALLEN, PATRICIA STUBE, JOANNE RYAN, SHARON URBON, JANE KELLEY and ALBERTA GORDON sought to intervene because the parties failed to identify them as victims of discrimination in sergeants' promotions.

In their requests to intervene, the petitioners urged that the parties to the decree treated the victims represented by the UNITED STATES considerably less favorably than BARBARA MCNAMARA, who was represented by private counsel, and that the parties treated the females considerably less favorably than the minority males. They urged that the parties used double standards when determining who are victims, and in

calculating damages and seniority dates, as follows:

(For Hiring Claims)

Identity of victims and Hiring ratios

The parties identified the victims of hiring discrimination as females and minority males who took the 1968 and 1971 test for males and the 1972 test for females. The females were not allowed to take the tests for males. (NR 1843, p.3,9).

Approximately 13,136 persons (8,136 males and approximately 5,000 females) applied to take the police entrance tests in 1971-72. The ratio of minority males to the total applicants was 2,712 out of 13,136, or about 20%; the ratio of females to the total was 5000 out of 13,136, or about 39% (NR 840, p.7).

The parties presumed that, if the 1972 test had been provably content

valid, that minority males would have been hired at a ratio of 33%, the ratio of minority male applicants to the number of all male applicants. To fill the "slots" for minority male recipients, the parties included minority males who did not pass the 1968 and 1972 entrance tests (NR 1834, expl.15).

The parties presumed that if females had been allowed to take the same test as males, females would have been hired at a ratio of 23.3%, the female pass rate on a future test, the 1975 unisex test (23.3%). The parties used the 23.3 % ratio only for the first 93 "slots" for females, and then used a 16% ratio for slots 94 to 248, on the ground that in 1974 the parties had entered into a court-approved Interim Hiring Agreement, under which females

were hired under a 16% quota. The Court of Appeals later described the 16% female quota as what was leftover after white and nonwhite men were allocated 42/42 quotas, United States v. City, 549 F.2d 415,437 (7th Cir. 1977). In contrast to their treatment of minority males, to fill the "slots" for females, the parties did not include females who took but did not pass the 1972 entrance test, even though many slots remained unfilled. (NR 1834, p.10, expl.4-6, 12-13).

Total number of hires

After determining the ideal hiring ratios, the parties then determined the total number of officers actually hired from the 1971-72 lists. The parties used a figure of 1362 for the total number of hires for the calculation of female awards, and the figure of 1480

for the same variable in calculating the minority male awards (NR 1834, p.5,6, expl.4).

Determination of seniority

The parties used the aforedescribed hiring ratios to determine how many females should have been hired and how many minority males should have been hired. From this they determined the retroactive seniority date awarded to identified victims.

Damages and interest

In computing average pre-hire losses, although the 1970 census showed that females with college degrees earned less than minority males with high school diplomas (NR 1729, Group Exhibit D), the parties agreed that minority males on the average earned less than females. This premise was based upon the CITY's "sample of the pre-hiring

earnings of minority males and females before their employment as police officers", which the parties described as follows:

> "...incomplete...not recorded systematically or routinely. References to salary often did not indicate whether the amount quoted was by hour, week or month; and did not indicate whether the stated earnings were take-home pay or gross pay. Often salary or earnings were not stated at all. In addition, some police officer applicants were not employed..." (NR 1834, pp. 16-17).

Based upon the samples, the parties agreed that the average pre-hire losses for females was $2000.00, and for minority males was $2,250.00 (NR 1834, pp. 16-17).

Petitioner FELDMAN's actual pre-hire losses were approximately twice the amount the parties assumed for females; she had been previously employed as a secretary (NR 1729, Group Exhibit C).

Based upon other samples, the parties agreed that the average post-hire losses (lost step increases) were $700.00 per year before 1976 and $387.00 per year after 1976 (NR 1834, pp. 17-18).

Petitioner FELDMAN's actual post-hire losses were approximately $2000.00 or more per year (NR 1729, Group Exhibit C).

After calculating pre- and post-hire losses, the parties agreed to add only 45% of calculated interest (NR 1834, p.18).

(For sergeant promotion claims)

The date discrimination ended

The parties choose June 16, 1975 as the date discrimination ended in sergeant promotions (NR 1834, expl.9). On this date the CITY selected temporary sergeants, as follows:

The CITY selected minority males as temporary sergeants in numbers in excess of their 20% applicant pool at that time (35%). After the temporary appointments were rescinded in 1977, minority males were immediately promoted pursuant to a 40% quota, far in excess of their applicant pools (NR 1729, p.22; NR 1834, expl. 18).

On the same date of June 16, 1975, the CITY selected 3 females as temporary sergeants in numbers proportionate to their applicant pool at that time. After these 3 were tranferred back to patrol in 1977, no females were promoted as permanent sergeants until 1982 (with the exception of one black female who was promoted in 1980 as part of the minority quota) (NR 1729, p.22; NR 1834, expl. 18).

Identity of victims and promotion ratios

The parties identified the victims of discrimination in sergeants' promotions as males who took the 1968 sergeants' test, and females who were on the job in 1968, but were barred from taking the 1968 test (NR 1834,p.3). Females were allowed to take the next sergeants' test given in 1973.

To determine the number of minority males that should have been promoted to sergeant between 1972 (when Title VII became applicable to cities) and the date they agreed discrimination ended, the parties used the ratio between minority men to patrolmen (20%), and added 2. They determined 38 positions should have gone to minority men (NR 1834, expl 11, 17-19).

To determine the number of females that should have been promoted to sergeant during the same period, the

parties agreed to use the ratio between policewomen and matrons to patrolmen, without the extra 2, and determined 3 positions should have gone to females (NR 1834, expl 16).

The parties identified the minority male victims as 38 minority males in rank order from the 1968 sergeants' list who were promoted from either the 1968 or 1973 sergeants' test (NR 1834, expl.17-19).

The parties identified the female victims, not as the first 3 females in rank order who passed the 1973 sergeants' test, but rather as the first 3 females to actually be promoted to sergeant. Of these 3 women, Jacqueline Thomas was promoted as a black, out of rank order from the 1973 list to fill the 40% minority quota; Geraldine Perry was promoted from the list from the next

test, the 1978 test, and Katherine Ingram was promoted from the 1978 test out of rank order as a black (NR 1729, pp. 19-20).

The following is a list in rank order of 8 of the 11 females who passed the 1973 test. The females who are recepients of awards under the consent decree are underlined; the present petitioners are in all capitals:

Rank on 73 Revised List		Score
# 500	CAROLE ALLEN	75.40
# 1094	PATRICIA STUBE	73.00
# 1095	Jacqueline Thomas	73.00
# 1203	JOANNE RYAN	72.40
# 1264	SHARON URBON	72.10
# 1576	JANE KELLEY	70.90
# 1760	Geraldine Perry	70.30
# 1881	ALBERTA GORDON	70.00
Below passing:		
----	Katherine Ingram	----

(NR 1729, pp.20-21)

The CITY did not promote females who passed the 1973 sergeants' test because of the court-imposed quotas--40% for minority males, 60% for white males, and 0% for females. The CITY promoted virtually all of the minorities on the 1973 list, skipping over the females, and reaching below #1800 to promote a minority male (NR 1729, p.18). Although the CITY did promote one female off the 1973 list, Jacqueline Thomas, the CITY did not promote her as a female, but rather to fulfill the minority quota - Thomas is black. The CITY passed over two petitioners who ranked higher, ALLEN and STUBE, to promote Thomas (NR 1729, p. 18).

In the consent decree, the parties agreed that the females who passed the 1973 sergants' test were not victims of

discrimination because these females were never promoted to sergeant, and therefore never showed they were qualified to be sergeants through job performance. The petitioners were not promoted due to the court-imposed 0% female quota on the 1973 sergeants' list. (Petitioner CAROLE ALLEN was a temporary sergeant from 1975-77, and received high efficiencies, NR 1729, pp.17-18).

Using the female applicant pools that existed between 1972 and 1978, the number of females that would have been promoted to sergeant if they had been promoted in ratios reflective of their applicant pools, the same forumla used to determine minority male victims, are as follows:

	Ideal mumber	Actual promotions
in 1972	2	0
in 1973	1	0
in 1977	7	0
in 1978	4	1

(NR 1729, Exhibit A, letter of April 28, 1978 from the Government's attorney to the City's attorney shows above chart through 1977; NR. 1729, p.23).

The petitioners urged that using the formula applied to minority males in the consent decree, and acknowledging that discrimination continued to at least 1978 for females, the following petitioners, all of whom were on the job in 1968 and who passed the 1973 sergeants' test, would have been promoted to sergeant in the following years:

CAROLE ALLEN	5 /01/ 72
PATRICIA STUBE	11 /01/ 72
JOANNE RYAN	1977
SHARON URBON	1977
JANE KELLEY	1977
ALBERTA RADFORD GORDON	1978

(NR 1747, p.26a)

Disposition of petition to intervene

Nearly a year after petitioners filed their request to intervene, by minute order of June 6, 1989, the District Court denied the petition, stating orally that it was untimely (minute order and transcript are in Appendix). By order of June 7, 1989, the District Court entered the consent decree (NR 1859, 1860, 1861).

By its opinion of July 24, 1990, the Court of Appeals affirmed the District Court (slip opinion is in Appendix).

REASONS FOR GRANTING THE WRIT

I.

Where the District Court had found that an existing party would adequately represent the interests of proposed intervenors, the timeliness of their petition to intervene should run from the point of time when they reasonably knew that existing parties ceased to adequately represent them.

In the present case, where the District Court found that the UNITED STATES would adequately represent the female victims of the CITY's discrimination, the time to intervene did not begin to run until the victims first knew the Government agreed to settle the claim of one victim for a fraction of her actual damages, and further agreed to forgo entirely the claims of other victims.

Requisites of intervention

The four prerequisites for intervention as of right, are:

> (1) the application must be timely;
>
> (2) the applicant must have a direct and substantial interest in the subject matter of the litigation;
>
> (3) the applicant's interest must be impaired by disposition of the action without the applicant's involvement; and
>
> (4) the applicant's interest must not be represented adequately by one of the existing parties to the action.

Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985) cert. denied, 474 U.S. 980 (1985); F.R.C.P. Rule 24(a)(2).

As the victims of the CITY's discrimination in hiring and promoting females in the police department, petitioners sought to intervene as a matter of right, since they have a direct and personal interest in this case. Petitioners are so situated that

the Court's orders impaired or impeded their ability to protect their interest, and, when the UNITED STATES agreed to the terms of the consent decree, their interests ceased to be adequately represented by existing parties.

In the alternative, petitioners sought permissive intervention, pursuant to F.R.C.P. Rule 24(b)(2), because their claims and the main action have questions of law or fact in common.

The petition to intervene was timely

The District Court and the Court of Appeals found that petitioners the request for intervention was untimely. Neither the District Court nor the Court of Appeals indicated at what point the petitions to intervene would have been timely.

Petitioners urge that the time to intevene should run from the point that they knew the UNITED STATES ceased to adequately represent them, when the proposed consent decree was circulated in spring of 1988. Before that time, the petitioners did not have notice of the Government's capitulation to the CITY's demand to pay the identified victims only a fraction of their damages and to fail to identify other victims. Before that time, on November 24, 1974, the District Court had decreed that the Government has a duty to adequately represesent the female victims of the CITY's discrimination, after the Government and the CITY objected to BURAURER plaintiffs' motion to represent the females as a class (N.R 188, 195, 196, 198, 207, 232, 246). The District Court decreed:

"the Government will adequately represent those injured by the City defendants' misconduct"

U.S. v. City, 411 F.Supp. 218 at 243.

The CITY and the UNITED STATES had vigorously opposed the BURAURER intervenors' attempt to represent the females as a class. These parties respectively asserted:

The CITY:

"applicants here do not seriously urge that their interests, if any will be inadequately protected by the United States. Indeed this Court has already granted the Attorney General a premliminary injunction. If the appplicants come within the terms of the order, they are fully covered and their interests are protected."

(Defendants' Memorandum in Opposition To Motion to Intervene, N.R 196, p. 3)

The Government:

"It also clearly cannot be argued that the United States has not adequately represented females on the issues of final remedy and back pay, since those issues have yet to be litigated."

(Plaintiff United States' Response to Applicant's Memorandum in Reply to Parties' Response" N.R 207, p.6)

As indicated by the above quotation, the Government acknowledged that the adequacy of its representation would not become an issue until the matter of back pay was to be litigated.

Petitioners presented their petition to intervene on July 22, 1988, well in advance of the ruling on the fairness of the proposed consent decree, on June 8, 1989.

The number of years that elasped between the time that the District Court found the CITY liable in 1976, and the time the CITY agreed on a settlement in 1988 was caused by the fact that the CITY apparently made no attempt to settle damage claims for any victims until it was hit with a large award in favor of BARBARA MCNAMARA in 1987.

> "` The timeliness requirement was not designed to penalize prospective intervenors for failing to act promptly; rather it insures that existing parties to the litigation are not prejudiced by the failure of would-be intervenors to act in a timely fashion. '"

Bloomington Ind. v. Westinghouse Elec. Corp., 824 F.2d 531,535 (7th Cir. 1987).

Inadequate represention

In an employment discrimination case, the district court is duty-bound to "fashion the most complete relief possible." International Bhd. of Teamsters v. United States, 431 U.S. 324, 364, 97 S.Ct. 1869 (1977).

The law requires that victims of discrimination be made whole, and mandates the award of back pay and interest. In Horn v. Duke Homes, 755 F.2d 599 at 606 (7th Cir. 1985), the court held that the lower court did not have discretion to deny back pay.

Where liability is not in dispute, and where the amount due may be calculated by simple arithmetic, the right of an employee to full liquidated damages cannot be compromised. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S.Ct.895 (1945); Watkins v. Hudson Coal Co., 151 F.2d 311, 314 (3rd Cir. 1945).

In United States v. Allegehny Ludlum Industries, Inc., 517 F.2d 826, 863-64 (5th Cir. 1975), the Court found that the average award under the consent decree was fair because the decree allowed "each eligible employee the free option to reject his or her tender and sue for more".

In Cotton v. Hinton, 559 F.2d 1326, 1334 (5th Cir. 1977), the court noted:

> "the consent decree itself provides for opting out...
> "a fund of an unlimited amount has been created by agreement of the parties to insure that any class member who has been discriminated against will be made whole..."

In Officers for Justice v. Civil Service Com'n, Etc. 688 F.2d 615, 634-635 (9th Cir. 1982), an opt-out notice was given to members of the class indicating that named plaintiffs had the opportunity to intervene to individally pursue their own damages.

In the present case, it is impossible to understand what the Court of Appeals meant when it said that petitioners "are being provided with substantial redress" (p.5,n.2 of slip opinion in Appendix).

Petitioner FELDMAN, an identified victim of intentional hiring discrimination would receive only 12% of her actual damages. The other petitioners are not even identified as victims.

The decree does provides monetary relief to a substantial number of

non-victims, namely minority males, who simply could not score well on the tests. The females were not allowed to take those same tests.

The District Court had resolved liability against the CITY, imposed injunctive relief, and all that remained was the mechanical process of identifying victims and calculating their back pay, interest, and adjusted seniority dates. For the sparse number of female victims, there are no stronger claims and weaker claims, there was nothing to be negotiated and nothing to be compromised.

Contrary to its willingness to fold up in 1987, in earlier times the Government sought actual damages for the victims.

In 1978, the UNITED STATES informed the CITY that the amount owed to make

victims whole would exceed $25,000,000, and that a fair interest rate would be 6%. (NR 1741, Exhibits A & B, letters of February 24 and April 28 of 1978). In 1978, the estimated damages due was much smaller than in 1988 because 10 years of interest had not yet accrued. If the CITY had set aside that sum at the time, at 6% interest, compounded, the fund would now be approximately $50,000,000.00. In the 1988 consent decree, after 10 years of interest should have accrued, the Government agreed to settle for a total of only $9,000.000.

(For Hiring Claims)

Lost wages and interest

If petitioner MARSHA FELDMAN, #122 on the female hiring list, calculated her damages using the fromula applied to intervenor BARBARA MCNAMARA, her damages

would be $123,959.90, rather than the $14,517.15 she whe will receive under the consent decree. Conversely, if MCNAMARA, #129 on female hiring list, took her award under the formula of the consent decree, she would receive only $18, 304.39.

The Government agreed to calculate damages according to a different formula than the formula applied in 1987 to intervenor MCNAMARA.

To compute average pre-hire losses, the Government accepted the CITY's improbable representation that from "a sample of the pre-hiring earnings of minority males and females before their employment as police officers", they concluded that minority males on the average earned less than females. This assertion is contrary to both the 1970 census data (NR 1729, Group Exhibit D)

and contrary to common knowledge and common sense. The 1970 census showed that females with college degrees earned even less than minority males with high school diplomas.

The CITY admitted it had only sketchy and unreliable information, and that it used only samples. The CITY's survey lists for females and minority males contains supposed salaries for various jobs, with no indication of how long anyone stayed at a certain job. The years are all mixed up, and the years used for males are earlier than the years used for females. The male survey includes pre-1972 salaries, which is before the relevant period. There is nothing to indicate that the lists contained representative samples. The lists do not show the percentages of persons who were unemployed (NR 1729, Exhibits E and F).

Retroactive seniority

In determining retroactive seniority, the Government agreed to exercise a double standard in dealing with female and minority male victims. Retroactive seniority was determined by the number of individuals actually hired compared to the number of victims that should have been hired during the period of discrimination. The Government agreed to use a less favorable hiring ratio and a different figure for the same variable, namely the total number of hires, when dealing with females as opposed to minority males, so as to count the least number of females as victims.

By contrast, to fill slots on the minority male hiring list, the Government agreed to include minority males who did not even pass the 1968 and

1971 patrolmen's examinations (NR 1834, p.15).

(For Sergeant Promotion Claims)

Identity of victims

In identifying the female victims of discrimination in sergeants' promotions, the parties agreed there were only 3 victims, and that 2 of them were black females who were promoted to sergeant out of rank order to fill minority quotas.

The parties further agreed not to identify as victims the petitioners ALLEN, STUBE, RYAN, URBON, KELLEY, and GORDON, females who passed 1973 test, but were skipped over for promotion so that virtually all minorities could be promoted.

The Government agreed to exclude the petitioners because it agreed that a

recipient should already be a sergeant in order to receive an award, to show she is qualified.

Nevertheless, petitioners are not sergeants because the CITY skipped over them in order to reach below them on the list to promote minority males, because of the male only quotas on the 1973 sergeants' lists, 40% for minority males / 60% for white males.

Petitioners are qualified to be sergeants; the only qualification of being a sergeant in the Chicago police department is passing a sergeants' test, which petitioners have done. Most of the minorities became sergeants, not because they were more qualified or did better on the test than petitioners, but simply because they were minorities.

The date discrimination ended

The Government agreed that only 3 females could be counted as victims of discrimination, because it agreed that discrimination against females ended in 1975, and only 3 females would have been promoted to sergeant if females were promoted in numbers reflective of their applicant pool up to that time.

The Government agreed to define the cut-off date for discrimination in sergeants' promotions as the date that the minority males were granted quotas in excess of their applicant pool, June 16, 1975, even though females continued to be passed over after that date to fill the minority quotas. Only one female was promoted to sergeant before 1982, and no white females were promoted to sergeant until 1982, due to the 40% quotas for minorities - double their

applicant pool.

As shown in the charts in the Statement of the Case in this Petition, pp. 24-25, all petitioners would have been promoted to sergeant before 1978 if they had been promoted in ratios reflective of their applicant pools during the period that discrimination continued against females, the formula the parties applied to minority males.

In addition to back pay and retroactive seniority, petitioners should be granted the promotions of which they were wrongly deprived.

Prejudice to parties seeking intervention

In deciding whether intervention should be allowed, the courts consider whether the parties seeking intervention can bring their own separate suits, so that they would not be harmed by a

denial of intervention. United States v. Allegehny-Ludlum Industries, Inc., 517 F.2d 826, 844 (5th Cir. 1975).

In the present case, due to the passage of 13 years since the District Court made a finding of liability against the CITY, and the time the CITY made its first offer of settlement, the present petitioners would have no practical way to obtain their actual damages if they are not allowed to intervene in the present case.

Prejudice to existing parties

The CITY claims it would be prejudiced if the petitioners are allowed to intervene, yet it never explains how it would be prejudiced.

The CITY has settled this case so cheaply, that it sends a message to all employers that discrimination is cheaper by the dozen and the more settlement is

delayed the more an employer can save.

The CITY warned that the consent decree would fall apart if the petitioners are allowed to intervene. This suicidal stance defies all logic. Since no group except the petitioners have asked to intervene for individualized relief, the CITY can settle with most of the 700 named victims for short money- for 9 million dollars rather than nearly 50 million dollars. The idea that the CITY would rather pay 700 people their full damages rather than allow a small group to prove-up their full damages appears to be an absurd threat.

The Government tries to paint itself as an injured party, claiming that it went through painstaking negotiations and would be harmed if actual victims were to be allowed to

prove their actual damages. Manifestly, there were no painstaking negotiations going into the 1988-89 consent decree, but only a sellout of the rights of the only victims of the CITY's purposeful discrimination, - the females.

The consent decree is obviously the product of a Justice Department that has been exasperated by waiting 10 years for the District Court to allow ancillary proceedings, and the product of the CITY's Washington/Sawyer minority administration that wished to give away spoils to its minority constituancy.

C O N C L U S I O N

For the foregoing reasons, the petitioners pray that this Court reverse the order denying their request to intervene for individualized relief, and remand this matter for further proceedings.

Respectfully submitted,

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A P P E N D I X

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

APPEALS OF:

LINDA L. NELSON, MARY J. JONES, MARSHA S. FELDMAN, BERNICE ZIOLKOWSKI, DIANE J. OLSEN, DORIS J. BULLOCK, (WASHINGTON), CAROLE ALLEN, PATRICIA STUBE, JANE KELLEY, SHARON URBON, JOANNE RYAN, ALBERTA R. GORDON, JOAN BEIBEL.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 2080—**Prentice H. Marshall,** *Judge.*

ARGUED APRIL 13, 1990—DECIDED JULY 24, 1990

Before BAUER, *Chief Judge,* CUDAHY and POSNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This suit was originally filed against the City of Chicago by the United States government in 1973, a long, long time ago. The suit alleged that the City had discriminated on the basis of race and gender

in hiring into and promoting within its Police Department in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In January of 1976, the district court found that the City had followed an explicit policy of refusing to hire and promote women on the same basis as men, and ordered the United States to commence discovery necessary to seek relevant awards of backpay and retroactive seniority relief. The district court warned that ancillary proceedings would be conducted if the United States and the City could not come to an agreement on the appropriate remedy.

On April 4, 1988, the United States and the City filed a joint motion for approval of a consent decree in final resolution of the aforementioned backpay and seniority issues. The proposed consent decree provides for an interest-bearing backpay fund of over $9,000,000 and also provides for the adjustment of seniority dates of the victims of discrimination. The Erwin petitioners (a group of female sergeants and patrol officers employed by the Chicago Police Department) sought, in 1988 (some 15 years after the suit was originally filed), to intervene for the purpose of obtaining individualized relief. The Erwin petitioners also filed objections to the proposed consent decree. The district court denied this motion to intervene on timeliness grounds and, after a fairness hearing, approved the proposed consent decree. The district court reasoned that the intervention of the Erwin petitioners would have the probable effect of scrapping a settlement that was acceptable to a large majority of the victims and that had taken a great deal of compromise and many, many years to achieve.

The Erwin petitioners appeal on the grounds: (1) that they should be allowed to intervene to prove their actual damages because (since the federal government did not adequately represent their interests) the consent decree provides them with substantially less than their actual damages; and (2) that the consent decree approved by the district court is unfair to women because it treats women

differently on account of their gender and, in some cases, on account of their race. We affirm the denial of the Erwin petitioner's motion to intervene as untimely. Accordingly, we also decline to examine fully the merits of the petitioners' objections to the fairness of the consent decree.

I. Analysis

The Erwin petitioners sought to intervene as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, to intervene permissively under Federal Rule 24(b). Both forms of intervention require that a motion to intervene be *timely*. The Erwin petitioners contend that their motion to intervene was made in a timely fashion because they were unaware, until the consent decree was proposed (and not earlier), that the federal government—in their eyes—had not been adequately representing their interests. But, whether or not the interests of the Erwin petitioners were "adequately represented" by the federal government is not a direct ingredient of the timeliness question as such. Federal Rule of Civil Procedure 24(a) requires at least three different things: that a motion to intervene be timely; that a federal statute confer an unconditional right to intervene; and that the applicant's interest not be adequately represented by existing parties. While it may be true that an "adequate representation" analysis may be affected by the timeliness of a motion to intervene, the fact also remains that an untimely motion will fail even if the other requirements of the Rule are satisfied.

In *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985), we held that the district court is to use a "totality of the circumstances" test in deciding whether a motion to intervene was made in a timely fashion.[1] In that same case

[1] As an example of factors to be considered in assessing the "totality of the circumstances" we listed "the length of time the

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we also noted that the timeliness of a motion to intervene is "committed to the sound discretion of the district judge." *Id.* Hence, we review the denial of a motion to intervene on timeliness grounds for the abuse of judicial discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973). In an appeal from the denial of a motion to intervene by another group of petitioners in this same case, this court recently noted that "Judge Marshall thinks that this case should be winding down, as do members of this court. Litigation will have no end if every time parties resolve amicably (or drop) a point of contention, someone else intervenes to keep the ball in the air .... It was not an abuse to deny this application and so bring closer the finale of this exhausting case." *United States v. City of Chicago* (Appeal of Kimber), 897 F.2d 243, 244 (7th Cir. 1990) (citations omitted). While this recent expression of sentiment does not by any means touch on all the relevant factors, it certainly presents one important dimension.

The Erwin petitioners argue that, as victims of gender and racial discrimination, they should have been hired and promoted in accordance with their numbers in the relevant applicant pools throughout the period of time that discrimination continued against them, and that they should be given full backpay with interest and retroactive seniority. But, total, individualized relief is too much to expect from a consent decree which attempts to remedy many wrongs and redress many groups. After considering the total picture, we can find no abuse of discretion in this case.[2] The district court decided that, under the circumstances, this motion came too late, and we agree.

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[1] *continued*
intervenor knew or should have known of his interest in [the] case." 759 F.2d at 612. Note that this is not the same thing as the length of time the petitioner knew or should have known that his interests were not being adequately represented. The two inquiries are different and serve different purposes.

[2] We pause here to note that the Erwin petitioners' motion to intervene would probably fail on other grounds as well. To inter-

(Footnote continued on following page)

The Erwin petitioners are also attacking the gender and racial fairness of the consent decree. As the federal government's brief (a brief also adopted by the City) points out, however, the Erwin petitioners have no right to attack the fairness of the consent decree because they are not *parties* to the agreement. *Marino v. Ortiz*, 484 U.S. 301 (1988). Even so, we pause to note as we have before, that the district court's discretion to approve a consent decree is quite broad. *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986). And, the transcript of the fairness hearing makes it apparent that the district court was nothing but thorough in its assessment of the fairness of the decree. Hence, even if the Erwin petitioners were able to attack the fairness of the consent decree, their attack would surely fail.

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[2] *continued*

vene as a matter of right under Federal Rule of Civil Procedure 24(a), for example, the Erwin petitioners must show that their interests were not being adequately represented by the federal government. This is something that the petitioners have difficulty showing. The petitioners are unhappy with the consent decree, in part, because they think it does not provide them with enough backpay. The fact remains, however, that they are being provided with substantial redress—even though they think that they are deserving of another $1,000,000 or so. This fact does not show that their interests were not *adequately* represented, however. In fact, the Erwin petitioners are seeking to assert exactly the same claims pressed by the federal government—only in more individualized form. One must simply expect compromise from consent decree negotiations.

To intervene permissively, on the other hand, the Erwin petitioners must show that their intervention would not unduly delay or prejudice the rights of the original parties. It is beyond question that both substantial delay and prejudice will result to the parties if the Erwin petitioners are allowed to intervene at this late date. Hence, the Erwin petitioners have failed to present adequate grounds for intervention.

II. Conclusion

For all the foregoing reasons, the district court's decision to deny the Erwin petitioners' motion to intervene is

AFFIRMED.

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United States District Court
Northern District of Illinois
Eastern Division

USA v. CITY OF CHICAGO
73 C 2080

Minute Order of June 6, 1989:

Erwin et al petition to intervene to file petition for individualized relief is denied. Marshall, J. (NR 1861)

United States District Court
Northern District of Illinois
Eastern Division

USA v. CITY OF CHICAGO
73 C 2080

Excerpt of transcript of proceedings of June 7, 1989, pp. 13-15

Hon. Prentice Marshall:

One last particularized comment. Several persons have asserted their entitlement to individualized treatment of the nature that Ms. Burauer and Ms. McNamara obtained in their claims against the City for back pay and seniority adjustment. The Erwin group seeks to intervene at this stage for the purpose of presenting individualized claims, and there are others who make this assertion.

TR 1

The first thing that we should recognize, of course, with respect to the individualized claims is that Ms. Burauer did not receive any individualized relief. She was in this litigation from the beginning.

Of course, having prevailed in the litigation, she has not suffered any economic consequences of it, but she and her lawyer, and Ms. McNamara and her lawyer, Mr. Gutman--they were in the case from the beginning. They worked through it. They worked on it. They took a lot of risks. They ended up winning. And because they had been in it individually, they were heard on an individual basis.

Ms. McNamara was a large beneficiary. Her case went to the Court of Appeals. The City appealed it. Ms. Burauer apealed her loss.

The Court of Appeals affirmed both. They said that I was right in not awarding Ms. Burauer any individualized relief, and I was correct in awarding Ms. McNamara that which I awarded her.

If we were to grant othes now the right to assert individual petitions, we would in essence scrap the settlement. For if one can do it, all can do it.

I don't shun the work. There are days when I ask myself what will I do when they stop calling 73 C 2080. And the system in which I function certainly is elastic enough to accommodate the individual claims. It's been done before and it can be done again.

But there is something--and I don't say this critically, but there is

something unfair about putting the Government and the City to the pressures of negotiation, which we did perhaps in a rather sublime way, but we did, and have them come up with a proposal which appears to be overwhelmingly acceptable to the overwhelming majority--90 percent minimum of those who were on the lists, the identifiable beneficiaries, the qualified beneficiaries--but then say, well, okay, let's let individuals make their claims if they want.

Beccause, as I say, certainly it would be a scrapping of the consent, and whether the City and the Government could reach another accommodation which would provide individualized relief for some and not for others, I don't know, but I must tell you I think it highly doubtful.

Ms. Burauer and Ms. McNamara paid the price. One of them won, one of them lost. But this is not the time or the place to convert, now, all of the claims whichwere advanced by the United States in behalf of the women and minority persons in this City with regard to the Chicago Poliace Department.

It's not the time and the place to convert those to individual claims.

I know that some of you sit out there disappointed. I hope that I have touched upon most of your individual concerns. I have signed the consent decree. I had no authority to modify it.

But in reviewing it, I would not have made any modifications had I had the authority.